BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments	)	MB Docket No. 07-51

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the above-captioned Notice of Proposed Rulemaking ("*Notice*") regarding the use of exclusive contracts in the provision of video services to multi-dwelling units ("MDUs") and other real estate developments.[1] In these comments, Comcast seeks to raise the Commission's awareness of the many complex legal, factual, and policy issues that must be assessed as the Commission considers whether it can and should intervene in the relationships among landlords, tenants, state legislatures, and providers of multichannel video services, high-speed Internet services, and voice services. These issues cast serious doubt as to whether the Commission has either the factual predicate or legal authority for the change in policy contemplated in the *Notice*. At a minimum, the Commission must (a) refrain from abrogating or otherwise affecting existing contracts, and (b) ensure that whatever rules it adopts do not tip the regulatory scales in favor of or against any particular subset of MVPDs.

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[1] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007) ("*Notice*").

I. INTRODUCTION AND SUMMARY

MDUs are an important part of the video marketplace. Many consumers in high-rise apartments and condominiums, garden-style apartments, private housing developments, and other forms of MDUs benefit both in terms of lower prices and higher value from the competition between cable operators like Comcast and other MVPDs for the right to serve those consumers. It is wrong to suggest that exclusive arrangements between MDU owners and MVPDs prevent those consumers from receiving the benefits of competition; in fact, as the Commission previously found, the MDU marketplace may be "more competitive than other MVPD markets."[2]

The Commission has already conducted a detailed proceeding on the question of whether to prohibit exclusive arrangements between MDUs and MVPDs, and concluded that, on balance, there was no need for the Commission to take action on the issue.[3] This prior decision must be given significant deference, particularly as the Commission assesses the propriety of abrogating existing contractual relationships that were entered into based on the Commission's previous decision not to prohibit such contracts.[4]

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2 *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 13 FCC Rcd 1034 ¶ 129 (1998) ("*Sixth Video Competition Report*").

3 *See In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 ¶ 70 (2003) ("*MDU Order*"). In light of that determination, the Commission did not find it necessary to determine whether it has the legal authority to act in this area. *See id.* ¶ 71.

4 *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins.*, 463 U.S. 29, 30 (1983) ("[A]n agency changing its course … is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."). *See also Fox Television Stations et al v. FCC*, No. 06-1760, slip. op., at 21 (2d Cir. June 4, 2007) (the Commission must "provide a reasoned analysis for departing from prior precedent.").

The Commission's conclusions in that proceeding were based, in part, on statements by numerous parties about the significant pro-competitive effects of exclusive agreements, as well as the risks associated with interfering in the marketplace. For example, SBC (now AT&T) and GTE (now Verizon) both argued *against* restrictions on exclusive contracts. SBC declared that:

> The Commission should not dictate rules in [the area of exclusive contracts]. Whether or not to enter into an exclusive arrangement is a matter of private contract between the service provider and the property owner. The parties involved should be allowed the freedom to exercise their own choice in this area.[5]

Likewise, GTE cautioned that the Commission "should … refuse to break with its precedent that avoids interference with private contracts, particularly where there is no FCC authority to support such action."[6]

Since the Commission last focused on these issues, the competitive landscape has changed in ways that substantially benefit consumers and increase the risks that unnecessary regulatory intervention will produce unintended adverse consequences. Competition in the video marketplace has become *more* intense; consumers -- including those living in MDUs -- have even *more* choice; and MVPDs face *greater* pressures to provide consumers better value and improved services. DBS providers are now the second and third largest MVPDs in the country, and the telcos, most notably AT&T and Verizon, are finally exploiting the freedom they have

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5 Reply Comments of SBC Communications, Inc., filed in CS Docket No. 95-184, at 6-7 (Apr. 17, 1996).

6 *Ex Parte* Letter of GTE, filed in CS Docket No. 95-184, at 4 (Mar. 18, 1997). *See also* Ex Parte Letter of GTE, filed in CS Docket No. 95-184, at 21-23 (Mar. 31, 1997) (citing other contexts in which the Commission has found that exclusive contracts benefit both service providers and consumers).

had for over a decade to enter the video business.[7] Further complicating the analysis that must be undertaken by the Commission, many providers today compete to provide not just one service but three -- video, voice, and broadband Internet -- over a single wire. This increases the risk that Commission intervention will have adverse consequences for competition across industries and services.

Comcast believes that the record will demonstrate that the Commission lacks both the factual predicate and the legal authority necessary to prohibit exclusive arrangements, and particularly to abrogate existing agreements. Further, Comcast is concerned that the actions proposed in the *Notice* create a serious risk of diminishing competition for video, voice, and broadband Internet services and harming consumer welfare. The marketplace for MDU consumers is already intensely competitive, and consumers are reaping the rewards of that competition. Actions that place a "thumb on the scale to give a regulatory advantage to any competitor"[8] inevitably will result in diminished competition, and policies that displace burgeoning competition in the broadband and voice markets or distort the Commission's policy of competitive neutrality would only harm consumers.

The actions contemplated in the *Notice* also raise serious statutory and constitutional issues that the Commission must fully address before it can move forward. The sources of

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[7] In fact, Verizon's video business appears to be growing so fast that it is now the 11th largest cable operator and 13th largest MVPD in the country, with over 500,000 subscribers. *See* Steve Donohue, "Verizon CEO Seidenberg Rips Cable Competition," *Multichannel News* (June 20, 2007) *available at* http://www.multichannel.com/article/CA6453855.html. Notably, Verizon has achieved this growth without any of the regulatory help that it claims to need in this proceeding.

[8] *See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007) ("*Franchising Order*") (Separate Statement of Commissioner McDowell).

authority cited in the *Notice* appear to be thin reeds upon which to justify any new regulations in this area. In fact, Congress has already considered and specifically chosen *not* to give the Commission the authority the *Notice* assumes. Most important, none of the statutory provisions cited by the Commission provide the necessary authority to adopt regulations that would have the effect of abrogating existing contracts between MVPDs and MDU owners.

II. THE COMMISSION SHOULD BE WARY OF TAKING STEPS THAT WOULD DIMINISH THE BENEFITS CONSUMERS DERIVE FROM ALREADY FIERCE COMPETITION.

Comcast supports Commission policies that enable consumers to enjoy the benefits of competition, but cautions against any regulatory intervention that would upset the competition that is *already* accomplishing that goal. Comcast is concerned that, by taking the actions proposed in the *Notice*, the Commission may actually *diminish* competition -- in voice and broadband Internet, as well as video. Adopting rules that would have the effect of removing a consumer's only alternative option for broadband Internet and facilities-based voice services, or that would effectively favor one set of MVPDs over another, would actually harm consumers and would contradict existing Congressional and Commission policy.[9]

The Commission has already observed that competition in the MDU marketplace is fierce,[10] and that it "is improving, even with the existence of exclusive contracts."[11] There is

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[9] *See*, *e.g.*, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 ¶ 1 (2003), *subsequent history omitted* (noting that the 1996 Act "was partially designed to remove the decades-old system of legal monopoly in the local exchange and open that market to competition").

[10] *See Sixth Video Competition Report* ¶ 129 (competition in the MDU marketplace may be more competitive than in the MVPD marketplace at large).

[11] *MDU Order* ¶ 71.

nothing about the state of the marketplace today that suggests competition is any less fierce, or that consumers are benefiting any less. While there certainly will be examples of individual residents in MDUs having fewer choices in certain circumstances (such as an apartment tenant's inability to receive a DBS signal because the apartment does not face the southern sky), the record will show that MDU consumers can also accrue significant benefits from the intense competition that already occurs among MVPDs to serve them.

The *Notice* does not reflect the complexity or intensity of competition in the current MDU marketplace. For example, the *Notice* does not seem to contemplate the importance that competition amongst MDUs plays in this marketplace, or the leverage that MDU owners can exert over MVPDs. The *Notice* also does not acknowledge the wide variety of MDUs or exclusive arrangements that currently exist in the marketplace; AT&T's Operations President John Stankey said recently, "no two MDUs are alike,"[12] yet the *Notice* proposes a one-size-fits-all solution. For the Commission to make a reasoned analysis and provide adequate guidance, it must fully understand the complexities of differing arrangements, the interplay of differing regulatory structures, and the realities of multi-service, facilities-based competition.

A. Actions Taken in This Proceeding May Negatively Impact Competition and Consumer Welfare in the Voice and Broadband Marketplace.

One of the most significant changes since the Commission last sought comment on this issue is the ability of cable operators to deliver multiple services over a single wire. This innovation allowed cable to lead the way in delivering real broadband Internet and facilities-based voice competition to consumers. Today, many cable customers subscribe to more than one

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[12] Webcast of the Bear Stearns 18th Annual Technology/Communications Internet Conference, at 38:07 (June 12, 2007) *available at* http://www.att.com/gen/landing-pages?pid=5718.

service from their cable company, and there is an increasing demand for "triple-play" bundles of voice, video, and broadband Internet over a single wire. Unfortunately, the benefits that consumers derive from these innovations and the resulting competition may be at risk in this proceeding.

Today, cable operators like Comcast are using their existing networks to bring real, facilities-based competition to consumers of voice and broadband Internet services, including those in MDUs. The *Notice* seems to suggest that only telcos will be offering bundled services,[13] but that is of course untrue. While telcos may well be "*primed* to offer" such bundles, cable operators are offering these bundles *right now*, and have been doing so for a number of years. Cable companies have invested over $100 billion in private risk capital to build networks that could handle traffic for all three services. It was *cable* that invented residential broadband, with speeds in the millions of bits per second, while telcos were insisting that 64,000 or 128,000 bits per second was the best that could be done.[14] It is *cable* that has at long last brought residential

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[13] *Notice* ¶ 6 ("…the video provider marketplace is currently undergoing a change, with the entrance of traditional phone companies that are primed to offer a "triple play" of voice, high-speed Internet access, and video services over their respective networks.").

[14] *See Testimony of Stagg Newman, Vice President, Network Technology and Architecture, Applied Research, Bellcore, Bandwidth Forum, Federal Communications Commission* 10, 14 (Jan. 23, 1997), *available at* http://www.fcc.gov/Reports/970123.txt. ("ISDN I think has a real role, particularly over the next five to ten years. Because as you'll see later, getting a broadband mass network out there quickly is a tremendous challenge. And today almost all Internet services are much better over -- well, they're all better over ISDN than over POTS modem. And actually at ISDN speeds of 150 [Kbps]. That will be adequate for most of the services people envision over the next five years. Apparently that's the view when we talk to people like Microsoft and others. . . . I believe 128 [Kbps] today would be a tremendous step forward and that's what ISDN gives us.").

consumers the facilities-based alternative to monopoly phone service for which policymakers have waited all these years.[15]

Commissioner McDowell aptly recognized the importance of these developments at the outset of this proceeding: "[w]ith the advent of the 'triple play' of video, voice and high-speed Internet access services being offered by cable, telephone and other companies, it is important that the Commission's regulations treat all competitors the same when possible."[16] Despite the fact that cable operators provide multiple services over the wire that runs into a consumer's home or apartment, that wire is still subject to Commission rules that assume only one service -- cable service -- is being provided on that wire. As Commissioner Adelstein recently observed in a related proceeding on the cable inside wiring rules:

> Under our current rules, consumers or alternative cable providers have the option to purchase cable home wiring when the customer terminates its cable service. These rules, as written, contemplate a scenario in which only one service – a video service – could be provided over any given cable wire, and only one provider would seek to use that wire. However, technological innovations and cross-platform competition are now allowing multiple services to be provided over that same wire.[17]

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[15] Comcast Digital Voice ("CDV") has experienced tremendous growth since it was introduced in 2005. *See* Comcast Corporation, Comcast Timeline, http://www.comcast.com/corporate/about/pressroom/corporateoverview/comcasttimeline/comcasttimeline.html (last visited June 28, 2007). Comcast had only 306,000 CDV subscribers, reflecting a penetration rate of 1.6% of available homes, at the end of 2005. One year later Comcast had 1.9 million CDV customers, or 5.7% of available homes. *Compare* Press Release, Comcast Corporation, Comcast Reports 2006 Results and Outlook for 2007, at 11 (Feb. 1, 2007) *with* Press Release, Comcast Corporation, Comcast Reports 2006 Results and Outlook for 2007, at 2 (Feb. 1, 2007). The explosive growth of CDV has continued into 2007. In the first quarter alone, Comcast added 571,000 new CDV subscribers, nearly 2.5 times more than in the same period in 2006, bringing the total number of CDV subscribers to 2.4 million, or 7% of available homes. *See* Press Release, Comcast Corporation, Comcast Reports First Quarter 2007 Results, Apr. 26, 2007, at 2.

[16] *Notice*, Separate Statement of Commissioner McDowell.

[17] *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent*

(footnote continued…)

As Commissioner Adelstein recognized, the current rules do not take account of current marketplace and technological realities. Even where the MDU resident owns the wiring, and multiple providers are authorized to serve a property, it is not possible for an MDU resident to pick and choose separate providers for video, voice, and broadband Internet services in the same manner as detached dwelling residents in overbuilt communities can do. This is because of the way the cable inside wiring rules are currently designed and interpreted (including the Commission's recent decision to convert much cable "home run wiring" into cable "home wiring"[18]), and because of the fact that cable wire cannot be shared by multiple providers.[19] Even if a building must allow two providers to serve its property, the cable inside wiring rules allow the second provider to use the wiring of the first provider, rather than have the second provider deploy its own wiring.[20] Except to the extent that separate wiring pathways are

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(…footnote continued)

Local Exchange Carriers' Inside Wire Subloop, Report and Order and Declaratory Ruling, FCC 07-111 (rel. June 8, 2007) ("*Sheetrock Order*") (Separate Statement of Commissioner Adelstein).

[18] In finding that wiring behind sheetrock is "physically inaccessible," the Commission effectively moved the demarcation point further away from the actual MDU unit, thereby making much of what was previously considered "home run" wiring into "home" wiring. *See Sheetrock Order* ¶ 15. The Commission appears to be under the misimpression that it achieved some sort of competitive balance by pairing its Sheetrock decision with a decision on a Cox petition regarding access to ILEC subloops. This is incorrect for two reasons. First, the decision on the Cox petition does not have the effect of divesting the ILEC of the ownership of its property; unlike the cable operator who effectively is forced to terminate its ownership of the wiring, the ILEC continues to own the wiring it has constructed and collects a fully compensatory fee from any third party who obtains access to that wiring. Second, the decision in the Cox petition does not help cable operators, like Comcast, which do not use copper subloops to deliver their broadband Internet and digital voice services.

[19] For a discussion of why it is technically infeasible for multiple providers to provide service over a single wire using existing network architectures, *see* Comments of National Cable Television Association, filed in MM Docket No. 92-260, at 8 (Dec. 23, 1997).

[20] *See* 47 C.F.R. § 76.802(a)(2) ("Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: it gives the subscriber the opportunity to purchase the wiring at the replacement cost; the subscriber declines, and neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided

(footnote continued…)

constructed, the customer will be limited to a single provider for all of the services that are delivered over the one wire. Thus, prohibiting exclusive video agreements could undermine, rather than advance, the Commission's "interrelated federal goals of enhanced cable competition and rapid broadband deployment" for MDU residents.[21]

Take, for example, a situation where Comcast has an exclusive video agreement with an MDU, and also happens to provide residents of that MDU with broadband Internet and voice service over the same wire. If the Commission acts to abrogate the existing contract, or otherwise prevent the exclusive agreement, and the building owner allows Verizon to begin providing video service to the building, and a resident decides to terminate her video service with Comcast and switch over Verizon, Verizon would then take over Comcast's wiring, and the resident will lose her ability to continue to obtain Comcast's broadband Internet and voice services. In effect, the Commission's decision would reduce competition in broadband Internet and voice services by removing the ability of the cable operator to provide those services to consumers who want them. Such a result obviously would not serve the interests of competition. Nor, as discussed below, would it be lawful.

B. Favoring One Subset of MVPDs Over Another Using Dubious Notions of "Market Power" May Actually Diminish Competition and Harm Consumer Welfare.

If the Commission decides that it can and should prohibit any or all exclusive arrangements between MVPDs and MDUs or other real estate developments, it is imperative that

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(…footnote continued)

> reasonable advance notice to the incumbent provider that it would purchase the cable home wiring pursuant to this section if and when a subscriber declines.").

[21] *See Notice* ¶ 6.

any such rules must apply equally -- both as a matter of law and as a matter of practice -- to all competitors. Only rules that are competitively neutral would have any chance of generating the kind of competition that benefits consumers of voice, video, and broadband Internet. Unfortunately, the Commission's suggestion that it examine whether "market power" should be a part of the analysis seems to be an attempt to allow some companies, but not others, to enter into exclusive contracts. The Commission previously contemplated such a rule, but chose not to enact it.[22] Now, as then, such a rule would be contrary to good policy; it would be in direct conflict with the Commission's oft-stated goal of achieving competitive and technological neutrality,[23] and it would require the Commission to ignore marketplace realities.[24]

The primary problem with this proposal is that it would not increase competition for consumers who live in MDUs. If the goal is to maximize the choice of video service providers that is available to each individual household in an MDU, rather than just shifting market share, there is no more reason to allow AT&T or Verizon to have an exclusive contract than to allow

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22 *See In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 ¶ 261 (1997) ("*Inside Wiring Order*").

23 *See*, *e.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007 (finding that broadband delivered over wireless facilities in a Title I information service); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14986 (2005) (same, for wireline networks).

24 Of course, where Congress has directed the Commission to treat different providers of a particular service in different ways, the Commission is bound by Congress' directives. For example, Congress has established certain rules for "telecommunications carriers," certain additional rules for "local exchange carriers," other rules that apply only to "incumbent local exchange carriers" (with variations for two particular subsets of those), and certain rules that apply only to the Bell Operating Companies. *See* 47 U.S.C. §§ 251(a)-(c) & (f), 271-275.

Comcast to have one.[25] From the point of view of the consumer residing in the MDU, an MVPD that has an exclusive access arrangement to the MDU has "market power" in that MDU, regardless of how many other subscribers that MVPD may serve in the surrounding area. It does not matter whether the company providing the exclusive service is established or new to the marketplace -- the consumer still only has one choice.

Even more problematic, this "market power" proposal could actually reduce the competition to serve these developments. If the Commission should impose a prohibition only on those MVPDs it deems to possess "market power," it would be significantly hampering some MVPDs' ability to negotiate for and win contracts to serve MDU consumers. Without the ability to negotiate for these contracts on a level playing field with giants like AT&T and Verizon, those cable operators deemed to wield "market power" may be precluded from competing in the MDU marketplace at all. While that may be exactly what the Verizons and AT&Ts of the world would like, it would undoubtedly harm consumers. By removing potential bidders from the competition to obtain an MDU service contract, the Commission would be reducing the concessions an MDU owner could extract from the bidding MVPDs and pass along to its tenants.

Most fundamentally, the problem with the Commission's proposal is that it implies that *any* MVPD may have "market power." This is at odds with the facts, and with Commission precedent. As Comcast has demonstrated on numerous occasions, and as the Commission has

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[25] *See Notice*, Separate Statement of Commissioner Copps ("There is no reason why Americans who happen to live in [MDUs] should have a narrower range of choices when it comes to video and broadband service than Americans who live in free-standing buildings.").

found time and again, the video marketplace is intensely competitive.[26] No MVPDs have "market power" of the kind that could harm competition in the market for MDU consumers.

Furthermore, the idea of using "market power" in the video marketplace as a barometer in this context also fails to recognize the growing importance of bundled services. As detailed above, Commission action in this proceeding could impact the broadband and telephony markets in ways that the *Notice* does not seem to anticipate. Both Commissioners McDowell and Adelstein have recognized the growth -- and value -- of bundles. The fact that many companies now provide all three services over a single wire means that a decision that is intended to affect video services alone could significantly affect competition for other services, even to the point of undermining broadband competition and stifling long-awaited competition for voice services. Surely, this is not a result that the Commission desires.

Finally, the Commission should keep in mind how little an MVPD's "market power" actually matters in the marketplace to serve MDUs and similar real estate developments. As discussed more fully below, MDU owners have significant leverage and can extract concessions from MVPDs that other customers cannot. In states without mandatory access laws, the *property owners* have the *fundamental right* to exclude any provider they want to exclude, for whatever

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[26] *See*, *e.g.*, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 3876 ¶ 5 (2007) ("Competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation."); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755 ¶ 5 (2005) ("[C]onsumers today have viable choices in the delivery of video programming, and they are exercising their ability to switch among MVPDs."). *See also* Comments of Comcast Corporation, filed in MB Docket No. 06-189 (Nov. 29, 2006); Reply Comments of Comcast Corporation, filed in MB Docket No. 06-189 (Dec. 29, 2006).

reason.[27] The property owner makes a decision to enter into a particular relationship with an MVPD, be it exclusive or otherwise, based on his/her own conclusions about what is best for the property. The substantial number of MDUs and other properties which have chosen not to enter into exclusive arrangements serves as clear evidence that, regardless of whatever one may think about the motives behind exclusive arrangements, no MVPD has the necessary market power to force a property owner or manager to make a decision that is, in the property owner's estimation, contrary to the best interests of the property and the tenants.

C. Competition Amongst MDUs and the Leverage that MDU Owners Can Exert Over MVPDs Plays a Significant Role in the MDU Marketplace.

The Commission must also consider the extent to which competition amongst MDUs impacts video competition for consumers in MDUs, and the extent to which MDU owners can exercise leverage in their negotiations with MVPDs. These considerations reveal a marketplace that is intensely competitive, where MDU owners have the capability and sophistication to extract significant concessions from the MVPDs competing to serve MDUs.

When the Commission previously sought comment on this issue, it recognized that "MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace."[28] And, as the Commission previously explained, exclusive arrangements among MVPDs and MDU owners may reflect the competitive dynamic in the MDU marketplace:

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[27] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) ("[T]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the "right to exclude" is commonly held to be a fundamental element of property rights).

[28] *MDU Order* ¶ 11.

> [M]arket forces will compel MDU owners in competitive real estate markets to take their tenants' desires into account.… MDU owners must compete with rival owners to keep current residents and attract additional residents. In this context, an MDU owner that agrees to an exclusive contract in exchange for a monetary payment but does not somehow flow that payment through to its residents (e.g., a new swimming pool, a security system, or discounting the rent below the competitive level) is vulnerable to competition from similarly situated MDUs offering a more attractive mix of price and amenities to prospective tenants. If the MDU owner tries to simply keep the payment, new tenants will not be as attracted to the building and existing tenants will have an additional reason to relocate to another MDU (e.g., an otherwise similar residence where, to attract tenants, the owner has utilized its exclusive access payment to reduce rent or improve amenities).[29]

The Commission cannot ignore these previous conclusions. The facts suggest that overturning these conclusions will not be an easy thing to accomplish.

MDU owners and managers are sophisticated market participants, and understand the nuances of the agreements to which they bind themselves. MDU owners have a choice of whether to enter into any kind of exclusive arrangement, subject to *state* law. Many MDUs choose not to enter into exclusive arrangements because they have made a decision that doing so will allow them to better attract tenants, while others decide that the calculus favors some form of exclusivity. MDU owners who do believe some form of exclusivity would help them attract tenants invariably have at least three MVPD options -- the established cable operator and the two DBS providers -- and often a fourth, fifth, or even sixth option in the form of a SMATV provider, an overbuilder, or, more recently, an ILEC that provides cable service, such as AT&T or Verizon.

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[29] *Inside Wiring Order* ¶ 61. *See also id.* ¶ 42 ("We disagree that the building-by-building procedural mechanism does not benefit consumer choice because it merely substitutes one MVPD for another ... Generally, MVPDs encounter an environment in which the MDU owner must compete with similarly-situated MDU owners to attract and retain tenants ... MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace.").

MDU owners' leverage in this situation is also enhanced by the fact that some service providers concentrate their subscriber acquisition efforts on MDUs. Often, "alternative" MVPDs focus on particular MDU properties or developments because such properties offer high numbers of potential subscribers in concentrated areas, allowing these providers to gain higher returns on their capital investments compared to serving non-MDU consumers. More importantly, these providers *can* focus on MDU consumers because they often *do not have to abide by many of the regulatory constraints*, such as build-out requirements, under which many established cable operators must operate. For example, in a majority of the states where AT&T and Verizon have obtained state video franchising legislation, the legislation prohibits the imposition of build-out requirements.[30] This frees AT&T and Verizon to focus their video service deployment in any given community on high-density MDU properties, if they so choose. As a result, in some circumstances, there may be more competition to serve MDUs in a particular community than to serve the detached dwellings in that same community.

In previous proceedings, some of the cable industry's strongest competitors in the MDU marketplace recognized the important role played by competition among MDUs. For example, the Independent Cable & Telecommunications Association said that "[c]ompetition in the MDU market will best be advanced if the MDU owner, through the exercise of its private property rights, is allowed to determine which provider(s) will service its property and is allowed

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[30] Eleven states have enacted state video franchise legislation explicitly prohibiting state and/or local governments from imposing mandatory build-out requirements on state video franchise holders. *See, e.g.*, Fla. Stat. § 610.107; Kan. Stat. § 12-2023(f); Ga. Code § 36-76-10; Ind. Code § 8-1-34-17(b)(1); Iowa Code § 477A.5(1)(a); Mich. Stat. § 484.3303(8); Rev. Stat. Mo. § 67.2705(9); N.C. Stat. § 66-356(d); Act of June 4, 2007, No. 526, § 29(3)(b), 2007 Nev. ALS 326 (to be codified at title 58 of chap. 711 of the Nevada Revised Statutes); S.C. Code § 58-12-350; Tex. Stat. § 66.007.

to grant a chosen provider exclusive access …"[31] Nothing has happened in the intervening years to diminish the incentives of MDU owners to reach agreements that increase the attractiveness of their properties to current and potential tenants. To the contrary, the increasing number of MVPDs with the desire and ability to offer video services to MDUs enhances the MDU owners' ability to negotiate agreements that serve their and *their tenants'* best interests.

D. The Commission Must Account for the Complexities and Intricacies of the MDU Marketplace.

MVPDs of all sizes, from giants like AT&T and Verizon to smaller open video system ("OVS") providers like OpenBand,[32] invest significant amounts of capital for the right to serve MDU consumers. As it considers the level of competition in this segment of the MVPD marketplace, the Commission should carefully consider the numerous types of MDUs and other real estate developments that may be implicated by this proceeding, the various types of arrangements that MVPDs enter into with MDUs, and the various legislative decisions embodied in relevant state landlord-tenant and mandatory access laws.

There is a wide variety of MDUs and "other real estate developments" that could be affected by any actions the Commission takes in this proceeding. Is this proceeding limited only to high-rise apartments? Does it cover garden-style apartments as well? How about condominiums? Townhouses? Gated communities? Privately developed sub-divisions?

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31 *Ex Parte* Letter of Independent Cable & Telecommunications Association, filed in CS Docket No. 95-184, at 1 (Feb. 27, 1997).

32 OpenBand is a "converged telecommunications company" that, among other things, "teams with land developers and builders to design and build Smart Neighborhoods." *See* OpenBand Residential Services, *available at* http://www.openband.net/res/res.htm. *See also* Kim Hart, "In Suburbs, Locked Into a High-Tech Lure," *Wash. Post*, A01 (May 21, 2007) (detailing some of OpenBand's experience in suburban Washington, DC).

Privatized military housing? Universities? Long-term care communities? Each of these types of real estate developments seems to be swept into the Commission's inquiry, but each implicates different issues that the Commission must consider and which the *Notice* fails to contemplate. For example, different MDUs use different wiring construction techniques and building materials that affect whether and how other providers can deliver their services to consumers in those buildings. Even within similar types of real estate developments (*e.g.*, condominiums), one might find significant differences, such as different arrangements for collective governance.[33]

The *Notice* also fails to account for the fact that there are numerous types of exclusive arrangements, even within a particular type of MDU or real estate development. The type of arrangement that seems most at issue in this proceeding is a contract between an MDU owner and an MVPD by which the MVPD is the exclusive provider of video services in the particular building or real estate development.[34] As far as Comcast can tell, MVPDs of all sizes have entered into these types of agreements, and continue to do so.[35] These are done for a variety of reasons. Sometimes, the MVPD wants to ensure that it has a reasonable opportunity to recoup its

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[33] As the Commission has recognized, "many MDU owners are tenant-based condominium associations and cooperative boards that cannot be presumed to be non-representative of their tenants' interests." *MDU Order* ¶ 14. The Commission should also be aware of many other differences that may exist. For example, some condominiums include the cable fee in the condo fees, and, in that subset of condominiums, some allow the tenants to choose another provider and do not charge tenants the cable portion of the condo fee, while others require the tenant to pay the cable portion of the condo fee regardless of whether the tenant actually subscribes to the service. This is not an issue over which MVPDs have any control, but it is an issue which affects the competitive aspects of the marketplace.

[34] As discussed below, even where a cable, satellite, or SMATV provider has such an arrangement, individual tenants generally have the right to install, maintain, and use satellite dishes that are less than one meter in diameter, television antennas, and wireless cable antennas in such areas where the consumer has exclusive use of the area, such as a balcony or patio. *See* 47 C.F.R. § 1.4000.

[35] *See* Declaration of William F. Revell ¶¶ 8,11 – 16 & Exs. A - E (various exclusive access and exclusive service agreements); Declaration of William F. Revell ¶ 28 (exclusive access agreement of AT&T).

investment.[36] Other times, MVPDs enter into these arrangements at the behest of the MDU owner, who may have decided that an exclusive arrangement will increase the attractiveness of the property to potential tenants because of discounted rates for service, or may simply prefer only to have to deal with one provider because of increased responsiveness and accountability.[37]

At the same time, however, the Commission should be aware that many MVPDs and MDU owners enter into agreements that have the *effect* of deterring other MVPDs from providing service, even though they do not specifically grant a provider exclusive access rights. For example, bulk rate agreements can have the same effect as an exclusive access agreement. A bulk rate agreement is an agreement whereby the MVPD agrees to provide its service to the consumers in the MDU at a discounted rate, which is often paid to the MVPD by the MDU owner, who then includes video service as part of its lease benefits.[38] It is interesting to note that Verizon, even while pressing the Commission to eliminate exclusive contracts, has itself obtained bulk arrangements with developers of multi-thousand home private communities in order to obtain the practical benefits of exclusivity without calling it such.[39] Yet, from the point of view of the consumer, the effect is the same.

Property owners and developers also enter into exclusive *marketing* arrangements with MVPDs. Under these arrangements, the property owner agrees to engage in certain types of marketing for the provider in question, or to allow the provider certain unique marketing

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36 *MDU Order* ¶ 12 (noting that some MVPDs enter into exclusives to ensure that they can recoup their investment).

37 Declaration of William F. Revell ¶ 9.

38 Declaration of William F. Revell ¶ 7.

39 Declaration of William F. Revell ¶¶ 17 - 24.

opportunities of its own, to the exclusion of any marketing for any other providers. For example, an exclusive marketing agreement may require the MDU owner to provide certain marketing documents to new tenants upon signing of the lease agreement. Depending on how a particular agreement is drafted, the arrangement may not prevent other MVPDs from providing service in the building but it may deter their ability to do so, since marketing agreements are often coupled with revenue-sharing agreements, under which the MDU owner is paid a certain percentage of revenues generated from providing whatever service(s) is covered by the agreement.[40] Where the MDU owner has a financial incentive to direct tenants to the MVPD with which it has an agreement to the exclusion of other MVPDs, it may be less economically attractive in that situation for other MVPDs to offer service in that MDU.

Yet another type of exclusive arrangement involves exclusive wiring arrangements. In this situation, the MDU owner usually contracts with an MVPD such as the franchised cable operator or other MVPD to construct the wiring throughout the building, and then takes ownership of the wiring in exchange for which the MVPD has the exclusive rights to use the wiring.[41] This type of arrangement is different from the exclusive access arrangements described above because here the MVPD usually is not using its own facilities to provide the service;

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[40] Declaration of William F. Revell ¶¶ 18 – 33 & Ex. F (Verizon press release announcing its "aggressive plan to bring FiOS services to apartments, condos, and other multi-dwelling unit sites," through "an exclusive marketing arrangement with Verizon"); Ex. G (Verizon marketing materials advising developers of "Easy Money" they can receive from Verizon), Ex. H (AT&T "Smart Moves" program "is designed specifically to secure and retain AT&T California as the preferred provider of services," and confirming that "[i]n return for exclusively marketing our products and services, AT&T . . . compensates the owner a share of the billed revenue earned at their community"); Ex. I (examples of AT&T exclusive marketing agreement with revenue sharing); Ex. K (BellSouth "Standard Marketing Agreement" for exclusive MDU marketing of voice, mobile, Internet and video services); Ex. L (Qwest "Broadband Services & Marketing Agreement" for exclusive MDU marketing of voice, mobile, Internet and video services); Ex. M (Qwest marketing materials distributed to new tenants of MDUs Qwest serves).

[41] Declaration of William F. Revell ¶ 6.

rather, it is providing the service using the facilities owned by the MDU owner. As mentioned above, it may not be technically possible given existing network architectures for multiple MVPDs to simultaneously provide different services over the same wire.[42]

Finally, numerous states already regulate access to MDUs. There are currently 18 states, encompassing some 121 million people, that have some form of state mandatory access law.[43] These laws cover MDUs in such major metropolitan areas as Boston, New York City, Philadelphia, Miami, Washington, DC, Chicago, Cleveland, and Las Vegas. The fact that so

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[42] *See supra* note 19. Further, as explained below, the Commission may not have the legal authority to do force the sharing of the wire.

[43] *See*, *e.g.*, Conn. Gen. Stat. § 16-333a (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Del. Code. Ann. tit. 26, § 613 (2007); D.C. Code Ann. § 34-1261.01 (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to adequate compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Fla. Stat. § 718.1232 (2007) (prohibiting the denial of condominium owners or tenants access to any available franchised or licensed cable television service); 55 Ill. Comp. Stat. 5/5-1096 (2007) (providing tenant right to choose cable provider of choice, limiting payment for access at just compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Kan. Stat. Ann. § 58-2553 (2006) (prohibiting landlords from interfering with or denying access or service to a tenant by a cable television franchisee); Me. Rev. Stat. Ann. tit. 14, § 6041 (2006) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants' choice of cable service); Mass. Ann. Laws ch. 166A, § 22 (LexisNexis 2007) (same); Minn. Stat. §§ 238.02 (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access, and prohibiting discrimination against tenants based on their choice of cable service); Nev. Rev. Stat. Ann. § 711.255 (2007) (same); N.J. Stat. Ann. § 48:5A-49 (West 2007); N.Y. Pub. Serv. Law § 228 (Consol. 2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Ohio Rev. Code Ann. §§ 4931.04, 4931.11 (LexisNexis 2007); 68 Pa. Cons. Stat. Ann. § 250.503-B (West 2007) (prohibiting a landlord from preventing a cable operator from entering and serving a building if a tenant requests service); R.I. Gen. Laws § 39-19-10 (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants' choice of cable service); Va. Code Ann. § 55-248.13:2 (2007); W. Va. Code § 24D-2-1 et seq. (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to just compensation, and prohibiting discrimination in rental charges based on tenants' choice of cable service); Wis. Stat. § 66.0421 (2006) (prohibiting a property owner or manager from preventing a cable operator from providing service or interfering with such service to a resident of the property).

many MDUs cannot be subject to exclusive access agreements under state law belies the perceived need for Commission action.

Further, each of these states has chosen a slightly different manner in which to address what is fundamentally a local real estate issue. For example, some state access laws prevent landlords from entering into exclusive agreements,[44] while others are styled as eminent domain provisions.[45] Some state laws expressly limit the compensation a landlord may receive for permitting access,[46] while others are silent as to compensation.[47] Some laws expressly prohibit landlords from discriminating in rental charges based on the tenants' choice of cable service provider.[48] Some laws prohibit only *de jure* exclusive access agreements, while others prohibit both *de jure* and *de facto* exclusive access agreements.[49] Some laws grant rights only to franchised cable operators, while other state laws grant mandatory access rights to all MVPDs.[50] The differences among these laws mean that the Commission cannot be sure that any actions it

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44 *See*, *e.g.*, Kan. Stat. Ann. § 58-2553 (2006); N.J. Stat. Ann. § 48:5A-49 (West 2007); Va. Code Ann. § 55-248.13:2 (2007).

45 *See*, *e.g.*, Ohio Rev. Code Ann § 4931.04 and § 4931.11 (2007); Del. Code. Ann. tit. 26, § 613 (2007).

46 *See*, *e.g.*, D.C. Code Ann. § 34-1261.01 (2007); N.J. Stat. Ann. § 48:5A-49 (West 2007); N.Y. Pub. Serv. Law § 228 (Consol. 2007); Va. Code Ann. § 55-248.13:2 (2007).

47 *See*, *e.g.*, Kan. Stat. Ann. § 58-2553 (2007).

48 *See*, *e.g.*, R.I. Gen. Laws § 39-19-10 (8) (2007); D.C. Code Ann. § 34-1261.01 (2007).

49 *Compare* Fla. Stat. § 718.1232 (2007); Kan. Stat. Ann. § 58-2553 (2006); 68 Pa. Cons. Stat. Ann. § 250.503-B (West 2007); Wis. Stat. § 66.0421 (2006) *with* Conn. Gen. Stat. § 16-333a (2007); Me. Rev. Stat. Ann. tit. 14, § 6041 (2006); Mass. Ann. Laws ch. 166A, § 22 (LexisNexis 2007); N.Y. Pub. Serv. Law § 228 (Consol. 2007); R.I. Gen. Laws § 39-19-10 (2007); D.C. Code Ann. § 34-1261.01 (2007); W. Va. Code § 24D-2-1 et seq. (2007); 55 Ill. Comp. Stat. 5/5-1096 (2007); Minn. Stat. §§ 238.22 – 238.27 (2007); Nev. Rev. Stat. Ann. § 711.255 (2007).

50 *Compare* Conn. Gen. Stat. § 16-333a (2007); D.C. Code Ann. § 34-1261.01 (2007); Kan. Stat. Ann. § 58-2553 (2006); W. Va. Code § 24D-2-1 et seq. *with* Del. Code. Ann. tit. 26, § 613 (2007); Ohio Rev. Code Ann. §§ 4931.04, 4931.11 (LexisNexis 2007); R.I. Gen. Laws § 39-19-10 (2007); Va. Code Ann. § 55-248.13:2 (2007).

takes in this proceeding would have the same effect in New York City, Washington, DC, or Chicago as in Miami, Boston, or Las Vegas. The potential that Commission action would create confusion and upset the MDU marketplace in these heavily populated metropolitan areas is much greater than the potential that Commission action would help consumers in MDUs.

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In the four years since the Commission decided against intervening in the MDU marketplace, competition in the video marketplace at large, and the MDU marketplace in particular, has become even more intense, and consumers have been the ultimate beneficiaries. In the previous proceeding, as noted above, both SBC (now AT&T) and GTE (now Verizon) urged the Commission *not* to adopt rules restricting exclusive arrangements to provide video services to MDUs. Today, as then, the Commission in this proceeding must understand that any unnecessary regulatory intervention may have significant unintended consequences that could be detrimental for competition, not only in video, but also in voice and broadband Internet services.

III. SIGNIFICANT LEGAL QUESTIONS MUST BE ADDRESSED BEFORE THE COMMISSION CAN UNDERTAKE THE ACTIONS CONTEMPLATED IN THE *NOTICE*.

There are several significant legal hurdles the Commission must overcome before seriously entertaining the possibility of adopting any rules. First, there is very little -- if anything -- in the Communications Act on which the Commission can properly base any regulatory intervention in the relationships between MDUs and MVPDs. Second, the Commission should be especially cautious about disturbing an area of law that has always been controlled by state property and contract law. Third, the Commission must be careful not to violate Constitutional rights of MVPDs and MDU owners. Each of these concerns is discussed below.

A. None of the Statutory Provisions Cited in the *Notice* Provides Authority To Restrict the Freedoms of MDUs or MVPDs.

The *Notice* seems to assume that the Commission has free-ranging authority to take whatever actions the Commission believes to be necessary to facilitate video competition or prevent unfair practices. But the Commission's authority is narrowly circumscribed, and the agency must work within the framework of the laws that have been passed by Congress. As House Commerce Committee Chairman John Dingell has forcefully admonished the agency, "the FCC is not a legislative body -- that role resides here in this room with the people's elected representatives."[51]

Before examining the Communications Act provisions that the *Notice* cites as potential fonts of Commission authority in this area, it is instructive to note what the *Notice* does not cite -- an explicit provision in the Communications Act authorizing the agency to regulate the relationship between MDU owners and MVPDs. The lack of such a provision is no accident; in fact, Congress previously considered *and rejected* provisions that would have conferred this authority on the Commission. As the U.S. Supreme Court has recognized, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."[52]

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[51] Statement of Congressman John D. Dingell, Chairman Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, Hearing Entitled "Oversight of the Federal Communications Commission" (Mar. 14, 2007), available at http://energycommerce.house.gov/Press_110/110st21.shtml. *See also* Corey Boles, "House Democrats Grill FCC's Martin," *Wall St. J.* (Mar. 14, 2007) ("'If reform of th[e] regulatory structure is necessary, then it is Congress's prerogative to take such action as we have done before,' Dingell scolded. 'It is not the role of the FCC.'").

[52] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-3 (1987).

In 1984, Congress expressly chose *not* to include a provision that would have mandated access to MDUs for providing cable service. The language that Congress specifically considered, but ultimately did *not* adopt, was as follows:

> Sec. 633(a). The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner ... of a unit in such a building or park.[53]

As articulated by Congressman Jack Fields, one of the primary authors of the Cable Act of 1984, Congress chose not to include this provision because the goal of "mak[ing] cable service available to the greatest number of individuals . . . can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided."[54] In light of this legislative history, courts have rejected attempts to construe the Act as restricting an MDU owner's ability to limit access to its property through the use of exclusive contracts.[55]

More recently, Congress did adopt a more tailored provision that called for the Commission to adopt regulations "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite

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[53] *Cable Investments, Inc. v. Wooley*, 867 F.2d 151, 156 (3rd Cir. 1989) (citing H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), *reprinted in* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 13).

[54] 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

[55] *See, e.g., Cable Investments, Inc. v. Woolley*, 867 F.2d at 159 (rejecting attempt by cable operator to invoke the Communications Act in order to override the MDU owner's exclusive contract with a competing MVPD); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992) (the Communications Act cannot be used to usurp the right of MDU owners to exclude MVPDs from their premises).

services."[56] Congress intended that this provision would be used by the Commission to preempt various impediments, including "restrictive covenants or homeowners association rules," to the widespread adoption of over-the-air reception devices ("OTARD").[57] Congress clearly understood the competitive situation resulting from the various types of agreements prevalent in various real estate developments, including MDUs, and chose to address that situation *only* through Section 207's prohibition on OTARD restrictions. This simply reinforces the fact that Congress was aware that it was not giving the Commission the kind of authority it seeks to assert in this proceeding.

Because there is no provision of the Act that prohibits exclusive arrangements between MDUs and MVPDs, the *Notice* looks to sundry provisions of the Communications Act to cobble together authority. However, these provisions raise more questions than answers about the Commission's authority. This approach is one that then-Commissioner Martin has previously criticized. In his first opportunity to vote on FCC regulation of cable operators' MDU wiring, then-Commissioner Martin dissented from the 2003 *First Order on Reconsideration and Second Report and Order* on grounds that he was "not persuaded" that the FCC has the statutory authority to regulate in this area.[58] Congress has done nothing since then to expand the Commission's jurisdiction to regulate any aspect of multichannel video service competition within MDUs; the Commission's attempt to cobble together authority is no more convincing now than it was in 2003.

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56 *See* Telecommunications Act of 1996, Pub. L. 104-104, § 207, 110 Stat. 56, 114 (1996).

57 *See* H.R. Rep. No. 104-204 (I), at 124 (1995).

58 *MDU Order*, Separate Statement of Commissioner Martin (noting that, "the interpretation of these provisions in this item offers no limitation on [the Commission's] authority.").

The *Notice* looks primarily to Section 628(b) of the Communications Act as a potential source of authority,[59] but this provision is irrelevant to the question at hand. It grants the Commission no authority to address the contractual relationships between MVPDs and MDUs. Section 628 is an articulation of Congress's desire to encourage further competition in the video marketplace by addressing issues pertaining to MVPDs' access to cable-affiliated, satellite-delivered *programming*.[60] This provision was added to Title VI of the Communications Act as Section 16 of the Cable Television Consumer Protection and Competition Act of 1992.[61] This provision was originally an amendment introduced by Congressman Billy Tauzin, who said that "[t]he Tauzin Amendment, very simply put, requires [the cable industry] to stop refusing to sell its products to other distributors of television programs."[62] Nothing in the text, structure, history, or purpose of this provision suggests that it applies to issues other than access to programming.

Further complicating any suggestion that Section 628(b) gives the Commission general rulemaking authority is Section 628(d), which says:

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[59] 47 U.S.C. § 548(b). The notion that Section 628 may be somehow relevant to the issue of exclusive access agreements was originally suggested by Bell Atlantic in the Commission's previous exclusive access proceeding. *See* Comments of Bell Atlantic, filed in CS Docket No. 95-184, at 5 (Dec. 23, 1997). More recently, in its ex parte in the Franchising Proceeding, Verizon repeated this argument. *See Ex Parte* Letter of Verizon, filed in MB Docket No. 05-311, at 5-6 (July 6, 2006).

[60] As Comcast has noted in several other proceedings, Congress's intent in this regard has been fulfilled -- intense competition in the video marketplace and an ever-increasing diversity of available programming serve as proof that Congress's goals have been achieved. *See, e.g.,* Comments of Comcast Corporation, filed in MB Docket No. 07-29 (Apr. 2, 2007); Reply Comments of Comcast Corporation, filed in MB Docket No. 07-29 (Apr. 15, 2007).

[61] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 16, 106 Stat. 1460, 1482-83 (1992).

[62] Nothing about the adoption of Section 628 remotely suggests that it was intended to give the Commission authority to address "access to premises" issues that Congress consciously decided not to address in the Cable Act of 1984. *See supra* nn. 52-57 and discussion.

> Any multichannel video programming distributor aggrieved by conduct it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.[63]

This language demonstrates Congress' intent that the Commission enforce Section 628(b) through adjudication, not through the adoption of rules, and certainly not through the adoption of rules that are irrelevant to the goals of Section 628.

The Commission also asks about the potential implications of some parallel language that appears in both Section 628(b) of the Communications Act and Section 5(a)(1) of the Federal Trade Commission Act (the "FTC Act").[64] Section 5(a)(1) of the FTC Act says:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.[65]

On the other hand, Section 628(b) says:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[66]

The *Notice* appears to be drawing an incorrect conclusion based on the coincidence that eleven words happen to appear in both provisions. They are part of completely different statutes, written some 80 years apart from one another. The words do not even appear in the same order,

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63 47 U.S.C. § 548(d).

64 15 U.S.C. § 45(a)(1).

65 *Id.*

66 47 U.S.C. § 548(b).

and, to the extent that they do suggest some parallel meaning, the fact is that Section 628(b) includes language that *limits* the meaning of these words in the context of Section 628(b).

Of course, these provisions diverge not only in their text, but also in their structure, purpose, and history. Congress unquestionably did intend to give the FTC rather broad and open-ended authority to investigate and prosecute allegedly anti-competitive practices in the economy at-large. On the other hand, in the 1984 and 1992 Cable Acts, Congress much more specifically delineated the particular powers it meant to confer upon the Commission. Thus, the Commission cannot draw authority to regulate the relationship of MDU owners and MVPDs from Section 628(b).

Other Title VI provisions mentioned in the *Notice* are similarly unavailing as a source of authority. For example, the *Notice* mentions Section 623 of the Communications Act[67] as a potential source of authority. But Section 623 contains detailed provisions regarding the regulation of *rates* charged for cable services, and the only mention of MDUs is in a provision which says that the general requirement for a uniform rate structure does *not* prohibit bulk discounts for multiple dwelling units.[68] If anything, this provides further proof (in addition to the legislative history discussed above about the provision that was not adopted) that Congress was aware of -- and did not mean to empower the Commission to disturb -- exclusive access arrangements for MDUs. Likewise, Section 624(i) of the Communications Act[69] is of no help, either. Although Section 624(i) does give the Commission the power to regulate cable wiring

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67 *Id.* § 543.

68 *Id*. § 543(d).

69 *Id.* § 544(i).

inside the home, it expressly does so only in circumstances where the customer has terminated service.[70]

The *Notice* also mentions Section 706 of the Telecommunications Act of 1996 as potential source of authority.[71] But it too does not provide the Commission with the authority necessary to take the steps it is contemplating. As the Commission has properly and conclusively ruled, Section 706 is not a source of independent authority; rather, it is an important guidepost for the Commission to consider in choosing how to exercise the powers that Congress has elsewhere conferred on the agency.[72] Further, as discussed in more detail above, Section 706 may cut both ways in this proceeding. While the Commission, for whatever reason, may feel that prohibiting exclusive arrangements for video services would help to speed the deployment of broadband by ILECs, it obviously must not take actions that hamper competition in the broadband marketplace by making it more difficult for cable operators to provide broadband service in MDUs.

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70 *Id. See also In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 ¶ 5 (1993).

71 *See* Telecommunications Act of 1996, Pub. L. 104-104, §706 (1996).

72 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Op. & Order, 13 FCC Rcd. 24012 ¶ 77 (1998), subsequent history omitted ("For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."); *id.* ¶ 74 ("[W]e conclude that section 706(a) gives the Commission an affirmative obligation to encourage the deployment of advanced services, *relying on our authority established elsewhere in the Act*." (emphasis added)); *see also In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Order on Reconsideration, 15 FCC Rcd. 17044 ¶ 5 (2000) (affirming that Section 706 does not constitute an independent grant of authority). Even in the recent *Franchising Order*, the Commission recognized that it was empowered merely to "consider the goals of Section 706 when formulating regulations under the Act," and did not find that Section 706 gave it independent authority to promulgate rules. *See Franchising Order* ¶ 62.

Finally, the *Notice* invokes Sections 4(i) and 303(r) of the Communications Act.[73] But courts have determined that these provisions only provide the Commission with ancillary authority to adopt rules that are necessary to meet obligations specified in other sections of the Communications Act, not authority to engage in free-lance policymaking.[74]

B. The Actions Proposed by the *Notice* Would Involve a Significant Intrusion on State and Local Contract and Property Law.

As it considers the contours of its legal authority, the Commission should also take into account the extent to which any restrictions on contracts between MDUs and video providers would necessarily interfere with state property and contract law, such as state landlord-tenant law. Taking the actions contemplated by the *Notice* would run counter to both judicial and Commission precedent. It is well settled that the rights of property owners are a matter of state and local law.[75] Both Congress and the Commission have recognized that issues related to the area of MDU owners' contractual relationships with MVPDs are "best settled at the local

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73 47 U.S.C. §§ 154(i), 303(r).

74 *See American Library Ass'n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005) (in lack of specific statutory authorization, FCC's purported authority is "ancillary to nothing"). *See also California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I [of the Communications Act] is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities.") (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (FCC's authority under Title I "is restricted to that reasonably ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting.")).

75 *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Hotz v. Federal Reserve Bank of Kansas City*, 108 F.2d 216, 219 (8th Cir. 1939) (noting that the "general rule applicable to real property" is that "the law of that state [in which the premises are situated] governs the rights and liabilities of the parties").

level."[76] As such, the Commission appears to lack the necessary authority to take any preemptive actions.

Consistent with the policy of local and state control over such issues, 18 states have enacted laws governing (in various ways) the relationship between MDU owners and MVPDs seeking access to MDU tenants.[77] Each of these laws reflects judgments that have been made by duly elected representatives of the people, on subjects entrusted to their authority and with the accountability that our electoral system ensures. Without an express grant of authority from Congress, the Commission cannot displace and disrespect those legislative judgments.[78] Likewise, the Commission should not displace and disrespect the decisions of those states which have *not* chosen to pass a mandatory access law. Certainly, the Commission cannot infer the power to preempt state legislative judgments based solely on its desire to achieve some nebulous goal of "video competition." The Commission's authority extends only so far as Congress allows. Where Congress meant to give the Commission general preemptive power over state and local laws that constrain competition, it did so *expressly*, such as in Section 253.[79] Congress did not give the Commission this general preemptive power in Title VI.

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[76] *Implementation of the Provisions of the Cable Communications Policy Act of 1984,* Report and Order, FCC 85-179, 50 Fed. Reg. 18637-01, 1985 WL 132696 ¶ 80 n.51 (1985). *See also* 16 Cong. Rec H10435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (noting that the 1984 Cable Act left the issue of MDU access to the states).

[77] *See supra* note 43.

[78] Even as it took sweeping new actions to constrain the freedoms that Congress assigned to local government officials on franchising matters, the Commission was careful not to claim preemptive authority over state governments that had enacted their own franchising laws. *Franchising Order* ¶ 126**.**

[79] 47 U.S.C. § 253. Congress did empower the Commission to preempt state and local laws that "may prohibit or have the effect of prohibiting any entity to provide any … telecommunications service," *id.* § 253(a), but, notably, it granted the Commission no corresponding authority to interfere with laws that hinder video competition.

Commission and judicial precedent strongly suggests that the Commission may only interfere with contract rights where Congress has clearly authorized or directed the Commission to do so.[80] It has not done so here. Unlike other areas of law where Congress expressly conferred jurisdiction on the Commission to abrogate or restrict private contracts, such as in the program access context,[81] Congress has never empowered the Commission to interfere with the rights of property owners and MVPDs to enter into exclusive agreements.[82]

C. The Commission's Proposed Actions Would Implicate Constitutionally-Protected Contract and Property Rights of MVPDs and Property Owners.

Finally, the Commission should be wary of Constitutional considerations as it deliberates whether to interfere with lawful, arms-length contracts. Cable operators and other MVPDs, large and small, have invested significant sums of money in reliance upon, and provided due consideration for, the contractual rights that the Commission has previously approved but is now considering abrogating. MVPDs' property interests extend not just to the wires that they own, but to the capitalized investment in constructing those wires and providing services to any particular MDU. MVPDs have a reasonable, "investment-backed expectation" in their ability to continue to serve consumers in MDUs according to the provisions of their existing

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80 *California Water and Tel. Co*., *et al.*, Mem. Op. and Order, 64 F.C.C.2d 753 ¶ 17 (1977) (noting that the power to regulate private contractual agreements, even where they directly affect communications activities, "must be conferred by Congress. [It] cannot be merely assumed by administrative officers.") (citing *FTC v. Raladan Co*., 283 U.S. 643, 649 (1930)); *Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967) ("a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment."); *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) ("without express delegation of such authority from Congress, the Commission may not order a regulated entity to provide a competitor access to its facilities.").

81 *See* 47 U.S.C. §§ 548(c)(2)(C)-(D).

82 Even in the franchising context, the Commission could conceivably, if incorrectly, look to the express directive of Section 621(a)(1) prohibiting unreasonable denials of competitive franchises. No such explicit language exists with regard to contracts between MVPDs and MDU owners.

contracts. Taking the steps contemplated in the *Notice* may implicate MVPDs' and MDU owners' property rights and could give rise to an unconstitutional Fifth Amendment regulatory taking.

The Supreme Court's ruling in *Tahoe-Sierra* is consistent with the view that the actions contemplated in the *Notice* present Fifth Amendment issues.[83] As this case confirms, constitutional "takings" may occur both when the government takes action that involves a physical intrusion onto private property and when it uses regulation to restrict a property owner's use of his or her own property.[84] As a long line of cases confirms, regulatory takings require essentially ad hoc, factual inquiries focusing on the nature of the governmental action, the severity of its economic impact, and the degree of interference with the property owner's reasonable investment-backed expectations.[85] Although the *Tahoe-Sierra* decision rejected "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking," it endorsed Justice Holmes's admonition that "if regulation goes too far it will be recognized as a taking."[86] In this case, the Commission appears to be considering actions that would result in regulation that "goes too far."

It is presumably for this reason that the Commission has heretofore exercised restraint in interfering with private contracts. Even when implementing a statute whose principal purpose

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83 *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

84 The concept of property "extends beyond land and tangible goods and includes the products of an individual's labor and invention." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (concluding that trade secrets are property for Fifth Amendment purposes). *See also Ballstaedt v. Amoco Oil Co*., 509 F. Supp. 1095, 1097 (N.D. Iowa 1981) ("it is undeniable that contract rights are property and thus constitutionally protected").

85 *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

86 *Tahoe-Sierra*, 535 U.S. at 326, citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

was to break the ILEC monopoly in the provision of local phone services, and even where the factual record and legal context justified a *prospective* prohibition on exclusive access agreements for telecommunications services in commercial buildings, the Commission refrained from abrogating or restricting contracts between MDUs and local telephone monopolies, reasoning "that the modification of existing exclusive contracts … would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts."[87]

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The Commission's legal authority to act is tenuous, at best, and its legal authority to abrogate existing contracts is simply non-existent. The Commission should be leery about *inferring* the authority to limit MVPD agreements with MDUs based on its desire to promote competition in the MVPD marketplace. It is well established that "allegations of harm to competitors or competitors' customers do not in any way expand the Commission's ... powers"[88] and the Commission may not "in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation."[89]

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87 *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 ¶ 36 (2000).

88 *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 375, n.47 (D.C. Cir. 1977) (quoting *AT&T v. F.C.C.*, 487 F.2d 865, 880 (2nd Cir. 1973), *cert. denied*, 434 U.S. 1040 (1978)).

89 *MCI Telecommunications Corp.*, 561 F.2d at 375. *See also FCC v. R.C.A. Communications, Inc.*, 346 U.S. 86, 96-7 (1953) (Commission is not free to create competition for competition's sake alone).

IV. CONCLUSION

For the foregoing reasons, Comcast urges the Commission proceed with extreme caution in this proceeding. The Commission should not abrogate any existing contracts between MVPDs and MDUs or other real estate developments, and any rules the Commission adopts going forward should be applied on a competitively and technologically neutral basis that recognizes and appreciates the increased intermodal competition to deliver bundled services to consumers.

Respectfully submitted,

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